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When Mommy or Daddy is Gay: Developing Constitutional Standards for Custody Decisions

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When Mommy or Daddy is Gay: Developing Constitutional Standards for Custody Decisions

*by Paula A. Brantner**

What standard should a court use in making child custody decisions when one parent is gay, lesbian, or bisexual?

In this article the author examines the standards currently used by state courts in awarding child custody. She then analyzes the different ways in which a court factors in a parent's same-sex orientation in applying these different standards. Her examination of the bases for these decisions reveals that lower courts often rely on outdated information or negative stereotypes about homosexuality. The author then considers how the application of these standards may violate the constitutional rights of gay, lesbian, or bisexual parents. Finally, the author proposes the development and application of a federal direct adverse impact standard for custody decisions that would protect the best interest of the child as well as the rights of the gay, lesbian, or bisexual parent.

INTRODUCTION

Divorce can be one of the most traumatic and stressful experiences a person will undergo in his or her lifetime. When the trauma of divorce is intensified by a battle over custody of one's children, the process becomes even more difficult. When someone involved in that process is at the same time dealing with issues of same-sex orientation, perhaps for the first time, it is easy to see why gay, lesbian, or bisexual individuals involved in a dissolution of marriage may experience extreme pressure, since the issue of their sexual orientation could become a critical issue in the court proceedings. When gay and lesbian parents are forced to make

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the choice between their children and their partners, or when courts make that choice for them by imposing draconian restrictions based on myths about how homosexuality impacts child-rearing, the impact of divorce is particularly heartbreaking.

This Article will argue that universal constitutional standards regarding child custody cases and the gay parent are needed to ensure that homophobic biases do not prevent the best interests of the child from being fairly considered and to ensure that gay parents are not unfairly denied custody of their children. Parts I through III will examine the standards currently utilized in custody decisions involving gay and lesbian parents and will categorize custody decisions based upon the weight the court places on the parent's same-sex orientation. Part IV will demonstrate how current standards often rely upon scientifically unsupported and/or illogical stereotypes about homosexuality. Finally, Part V will question the constitutionality of these standards. Furthermore, this part will advocate the use of standards that do not rely upon bias but rather consider homosexuality to the same extent as any other factor already considered by the courts. The paper will conclude that these revised standards are warranted not only for their superior constitutional value, but also for their more equitable results where gay, lesbian, and bisexual parents are concerned.

I. GAY, LESBIAN, AND BISEXUAL PARENTS[1]

Approximately three to five million lesbians, gay men, and bisexuals in this country are parents, and approximately eight to ten million children are currently being raised in gay households.[2] Currently, the majority of parents who are gay and lesbian had children while involved in a marital or non-marital heterosexual relationship.[3] This relationship may have existed before the parent was cognizant of her or his same-sex orientation, or before he or she acknowledged it to others. This Article will focus on custody disputes involving children from previous heterosexual marriages. Breakups of same-sex relationships also give rise to custody battles, and cases involving biological and non-biological parents are increasingly litigated.[4]

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1. This Article uses the terms "gay" and "gay, lesbian, and bisexual" interchangeably to refer to persons with a same-sex orientation. The terms "nongay," "straight," and "heterosexual" are also used to refer to the parent who is not oriented towards someone of the same sex. The use of the term "homosexual" is avoided, as some (including the author) feel the word has negative, clinical, and sex-focused connotations.

2. ROBERTA ACHTENBERG, LESBIAN AND GAY PARENTING: A PSYCHOLOGICAL AND LEGAL PERSPECTIVE at 1 (National Center for Lesbian Rights, 1987).

3. *Id.*

4. *See, e.g.*, Alison D. v. Virginia M., 572 N.E.2d 27 (N.Y. 1991); Nancy S. v.

Custody battles involving gay, lesbian, and bisexual parents are probably the most frequently litigated of lesbian/gay rights issues, yet most cases remain relatively invisible.[5] Custody cases often do not go further than the trial court level, and therefore are mostly unreported.[6] Parties may choose not to appeal cases favorable to the gay, lesbian, or bisexual parent, since these cases are more likely to have been decided on grounds related to parenting, and not on bias or other grounds warranting appeal.[7] Those cases which are appealed often result in decisions unfavorable to the gay parent, creating a negative body of precedent that makes others less likely to challenge the disposition of their own cases.[8] In addition, for a custody case to be overturned on appeal, the appellant must demonstrate that the trial court not only made an incorrect decision, but abused its discretion by doing so, which is a difficult standard to meet.[9] Finally, appellate litigation is time-consuming and expensive. Parents may not have the financial resources to challenge adverse results, especially at a time when their emotional resources are drained as well.[10]

II. CURRENT STANDARDS FOR CUSTODY DECISIONS

A. BEST INTERESTS OF THE CHILD

The standard which is almost universally applied by courts faced with child custody decisions is the "best interests of the child" standard.[11] While the standard itself is vague, it has generally been interpreted to

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Michele G., 228 Cal. App. 3d 831 (1991); *See also* Nancy Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian Mother and Other Non-Traditional Families*, 78 GEO. L.J. 3458 (1990).

5. Rhonda R. Rivera, *Recent Developments in Sexual Preference Law*, 30 DRAKE L. REV. 311, 327 (1980-81).

6. *Id.*

7. Out of thirty-two reported custody cases surveyed, only twelve were initially favorable to the gay parent. Of those, four were overturned on appeal due to the insufficient weight given the parent's sexual orientation. Of the twenty cases initially won by nongay parents, only three were overturned in favor of the gay parent. NATIONAL CENTER FOR LESBIAN RIGHTS, LIST OF REPORTED CASES BY STATE (1988) [hereinafter NCLR LIST].

8. Gay parents lost at both trial and appellate levels in seventeen of the thirty-two cases reported, with an additional four cases lost at the appellate level. NCLR LIST, *supra* note 7.

9. *See, e.g.*, D.H. v. J.H., 418 N.E. 2d 286, 296 (Ind. Ct. App. 1981) (illustrating the difficulty of meeting the abuse of discretion standard). Only three of twenty custody cases initially unfavorable to the gay parent have been overturned upon appeal. NCLR LIST, *supra* note 7.

10. Donna Hitchens, *Social Attitudes, Legal Standards & Personal Trauma in Child Custody Cases*, 5 J. OF HOMOSEXUALITY 89, 94 (1979-80).

11. Jeff Atkinson, *Criteria for Deciding Child Custody in the Trial and Appellate Courts*, 18 FAM. L.Q. 1, 4 (1984).

mean that if a conflict exists between the rights of the parents and the court's perception of the child's best interests, the conflict must be resolved in favor of the child's interests.[12] This doctrine has gradually replaced the traditional "tender years" custody standard, which presumed that custody by the mother was always in the best interest of young children, if not all children.[13]

When making the "best interests" determination, courts usually rely on considerations such as: (1) which parent the child has lived with since the parents' separation; (2) the financial resources of each parent; (3) the home environment each parent will provide; and (4) whether one parent is better able to provide for any special needs the child may have.[14] In order to make the custody decision they feel will be best for the child, courts have a great deal of discretion to weigh these factors and any others they deem relevant. These additional considerations often will include the past and present sexual activity of both parents. If one parent is gay, lesbian, or bisexual, sexual activity almost certainly will be considered.[15]

B. CHANGE IN CIRCUMSTANCES

Courts employ a different standard when parents return to court to ask for modification of the original custody order. In addition to the best interests determination, a parent seeking modification must demonstrate to the court that there has been a change in circumstances substantial enough to warrant modification.[16] States vary regarding what types of changes affect the child to the extent that modification is necessary, but since the purpose of a higher standard of proof is to prevent frequent shifts in custody between parents, the change in circumstances usually must involve the child or custodial parent, and not merely the noncustodial parent.[17] For example, a change in the financial situation of the noncustodial parent which raises her or his income higher than the other parent would not be sufficient to warrant uprooting the child, because then the child could go back and forth between parents each time one parent received a raise. However, if the custodial parent became seriously ill, or remarried and moved to a new home, the noncustodial parent would generally be entitled to have the custody decision reevaluated.

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12. Steve Susoeff, Note, *Assessing Children's Best Interests When a Parent is Gay or Lesbian: Toward a Rational Custody Standard*, 32 UCLA L. REV. 852, 853-54 (1985).

13. Atkinson, *supra* note 11, at 12.

14. Hitchens, *supra* note 10, at 92.

15. Hitchens, *supra* note 10, at 94; NATIONAL LAWYERS GUILD, SEXUAL ORIENTATION AND THE LAW 1-9 (Roberta Achtenberg & Mary Newcombe eds., 3rd prtg. 1990) [hereinafter NATIONAL LAWYERS GUILD].

16. NATIONAL LAWYERS GUILD, *supra* note 15, at 1-11.

17. Atkinson, *supra* note 11, at 5.

The above standards negatively affect gay and lesbian parents more than heterosexual parents. Since homosexuality has been a key factor in many decisions favoring the nongay parent, it is generally raised and considered whenever a gay parent is a party.[18] The rights of gay people become secondary to the consideration of the child's welfare when the court believes that a parent's same-sex orientation can never be in the best interests of the child. The court presumes the child will be adversely affected, regardless of individual circumstances. If a gay parent obtains custody initially without revealing her or his same-sex orientation to the court, either deliberately or because the parent was unaware of her or his orientation, the nongay parent is very likely to reopen custody proceedings once the same-sex orientation of the custodial parent is revealed. Courts often consider the revelation of homosexuality to constitute a change of sufficient weight to warrant custody modification.[19]

III. CATEGORIES OF CUSTODY DECISIONS

In each custody decision in which a parent's same-sex sexual activity is a factor, consideration of that activity may be categorized by one of three standards: (1) conclusive disqualification standard: a parent's homosexuality is automatically presumed to make her or him an unfit parent; (2) presumptive unfitness standard: there is a rebuttable presumption of unfitness, which may be overcome if the parent conforms to behavioral guidelines designed to minimize what is perceived as the "negative impact" of parental homosexuality; or (3) direct adverse impact standard/nexus test: parental homosexuality will not be considered a significant factor, unless there is a finding of present adverse impact on the child.[20]

A. CONCLUSIVE DISQUALIFICATION STANDARD

While the facts may differ from case to case, whenever the court employs a conclusive disqualification standard the results are always the same: if the court is aware that one parent is gay or lesbian, that parent will not receive custody.[21] A parent's same-sex orientation alone mandates the conclusion that he or she is an unfit parent, regardless of the parent's relationship status, whether the parent is openly gay in the con-

18. NATIONAL LAWYERS GUILD, *supra* note 15, at 1-11.

19. *Id.* at 1-11; *see also* EDITORS OF THE HARVARD LAW REVIEW, SEXUAL ORIENTATION AND THE LAW 124 (1990) [hereinafter HARVARD LAW REVIEW EDITORS].

20. Nora Lauerman, *Nonmarital Sexual Conduct and Child Custody*, 46 U. CIN. L. REV. 647, 654 (1977); *see also* Robert A. Beargie, *Custody Determinations Involving the Homosexual Parent*, 22 FAM. L.Q. 71, 74-77 (1988).

21. This approach is also called the "per se" test by some commentators. *See* Beargie, *supra* note 20, at 74.

text of the family, or whether any impact on the child whatsoever is demonstrated. Courts are free in most states to ignore contrary expert testimony by merely stating that the decision was made in the best interests of the child, and can disregard any testimony of family, friends, or social workers that demonstrates not only that lesbians and gay men can be capable parents, but that the gay parent seeking custody would be the best custodial parent.[22]

Roe v. Roe[23] and *G.A. v. D.A.*[24] are typical examples of cases that employ the conclusive disqualification standard. In *Roe*, the father received custody following the mother's bout with cancer. During this time the mother was physically unable to care for her daughter, and so relinquished custody to the father in a consent decree. Nearly four years after the father gained custody, the mother became aware of her ex-husband's gay relationship with the man who shared the house with her daughter and ex-husband. She challenged the award of custody, and the trial court modified the decree to grant the parents joint custody. The modification was conditional upon the father not sharing a bed with his partner while the child was present in the home. The trial court found the child to be "a very happy child (who) seemed to be well adjusted and outgoing" and found no evidence showing that her father's homosexuality had any adverse effect.[25] This factor, however, was not taken into consideration by the appellate court, which granted sole custody to the mother. The court rationalized that "the father's continuous exposure of the child to his immoral and illicit relationship renders him an unfit and improper custodian as a matter of law . . . . The father's unfitness is manifested by his willingness to impose this burden upon (his daughter) in exchange for his own gratification."[26]

In *G.A. v. D.A.*, a Missouri case, a lesbian mother appealed the initial grant of custody of her son to his father. The appellate court denied the challenge, holding that "a court cannot ignore the effect which the sexual conduct of a parent may have on a child's moral development."[27] This decision was based on the fact that the lesbian mother lived with her partner and occasionally hugged her in front of the son.[28] There was a

22. *See, e.g.*, L. v. D., 630 S.W.2d 240, 243-45 (Mo. Ct. App. 1982) (trial court found that expert evidence, including articles from various journals, portions of books, and statistical studies dealing with homosexuality was not credible. "[The facts of this case] strip the scientific literature of its facade of statistics and in its application to this case reduce it to nonsense.").

23. Roe v. Roe, 324 S.E.2d 691, 694 (Va. 1985).

24. G.A. v. D.A., 745 S.W.2d 726, 728 (Mo. Ct. App. 1987).

25. *Roe*, 324 S.E.2d at 691-92.

26. *Id.* at 694.

27. *G.A.*, 745 S.W.2d at 728.

28. *Id.* It is likely, however, that even if she lived separately from her partner and

thoughtful dissent by Judge Lowenstein, who observed that, "[w]ith all the evidence here pointing to the best interests of the child being served in the mother's custody, her homosexual conduct should not automatically call for another result."[29] A later case, *S.L.H. v. D.B.H.*, firmly established Missouri's conclusive disqualification standard, stating that "placing primary custody of a minor child with the nonhomosexual parent is in the best interests of the child."[30]

In cases employing the conclusive disqualification standard, all other factors affecting the child's best interests tend to be ignored once the issue of a parent's homosexuality is raised. If factors such as financial situation or home environment are considered at all, their value is minimized to a considerably greater extent than if homosexuality were not an issue. For example, in *G.A.*, the child had his own bedroom while living with his mother, while his father slept in a one-room cabin and provided only a cot for the child.[31] If the mother were not a lesbian, it seems certain that the living conditions provided by each parent would be significant. Since she was involved with someone of the same sex, however, the court stated that "[the mother's] argument seems to be that this court should overlook her sexual orientation and award custody solely on the basis of which parent would provide the better house."[32]

Another example of the conclusive disqualification standard is the court's failure to consider the improved financial situation of a gay parent who lives with a partner. Although gay parents living with partners may be able to provide more financial resources for the child, they are generally less likely to be successful in a custody determination than a gay parent who lives alone, or a nongay parent who does or does not live alone.[33] Any financial benefits which might accrue are either not considered or are greatly outweighed by the perceived negative impact of the child's exposure to the parent's partner. Courts look favorably, however, at a nongay parent who remarries or enters into a relationship that improves the parent's financial situation.[34] Courts employing the conclusive disqualification standard appear so obsessed with homosexuality that all other factors become virtually irrelevant, and thus do not warrant mention

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never demonstrated any affection toward her in her child's presence, she would still not be able to retain custody if the conclusive disqualification standard was applied.

29. *Id.* at 730.

30. S.L.H. v. D.B.H., 745 S.W.2d 848, 849-50 (Mo. Ct. App. 1988) (mother was permitted to retain custody only because the court did not believe allegations that she was a lesbian).

31. *G.A.*, 745 S.W.2d at 729.

32. *Id.* at 728.

33. NATIONAL LAWYERS GUILD, *supra* note 15, at 1-19.

34. Donna J. Hitchens, Contested Child Custody and Visitation Issues, panel presentation at Lavender Law II (Oct. 6, 1990).

in their view.[35]

B. PRESUMPTIVE UNFITNESS/REBUTTABLE PRESUMPTION STANDARD

This approach, sometimes described as a "middle ground" approach,[36] presumes that a parent's homosexuality tends to negatively affect the child.[37] Unlike the conclusive presumption, however, under this approach courts will allow the gay parent to overcome the negative presumption. Most courts will allow the presumption to be overcome only if the parent agrees to minimize the child's exposure to homosexuality. On the face of it, the courts applying this standard focus on the sexual activity involved in being homosexual, rather than the status of being gay, lesbian, or bisexual. Thus, courts applying this standard will prohibit same-sex activity and require the gay, lesbian, or bisexual parent to agree to specific behavioral guidelines. The gay or lesbian parents who agree to the restrictions are able to overcome the detrimental effect their sexual orientation would have upon custody only by forgoing expression of their sexuality. Often the gay parent may lose custody by failing to follow the conditions imposed by the court.[38]

Another use of the presumptive unfitness standard is to mask the court's bias against granting custody to a gay or lesbian parent. These courts claim that they are willing to award custody to a gay or lesbian parent in appropriate cases, but in the particular case before them the parent has failed to meet the burden of demonstrating that no negative effect would result from awarding custody.[39] Significant in these decisions, however, is the absence of any clear assertion of what the appropriate case would be.

In both these applications of the presumptive unfitness standard, courts have retained their biases against homosexuality but have been influenced by society's willingness to accept homosexuality to the extent

35. Hitchens, *supra* note 10, at 92. Most of the reported cases deal exclusively with the issue of sexual orientation. Occasionally, a court will claim that homosexuality is not solely the basis for the decision, but homosexuality, coupled with other factors in the case, tips the scale in favor of the nongay parent. *See, e.g.*, Bark v. Bark, 479 So. 2d 42, 42-43 (Ala. Civ. App. 1985); Thigpen v. Carpenter, 730 S.W.2d 510, 513-14 (Ark. App. 1987).

36. *See* Beargie, *supra* note 20, at 75; L. Lee Dowding, Note, *Immoral Because They're Bad, Bad Because They're Wrong: Sexual Orientation and Presumptions of Parental Unfitness in Custody Disputes*, 26 CAL. WESTERN L. REV. 395, 409 (1990).

37. Lauerman, *supra* note 20, at 657.

38. The same denial or restrictions imposed in custody cases are even more commonly applied to visitation cases. Of twenty reported cases involving visitation rights of a gay parent, fifteen placed some restriction on the parent's visitation (most commonly, no overnight visitation, or parent's partner not allowed to be present). NCLR LIST, *supra* note 7.

39. *See, e.g.*, Constant A. v. Paul C.A., 496 A.2d 1, 9-10 (Pa. Super. Ct. 1985).

that it is hidden and does not challenge dominant norms.

Most presumptive unfitness cases purport to be based upon the sexual behavior of the gay, lesbian, or bisexual parent.[40] Those who might find distinctions based solely on the status of the parent's homosexuality unacceptable may readily accept distinctions based upon conduct. While courts may attempt to distinguish between status and conduct in presumptive unfitness cases, they tend to disregard the distinction when issuing the custody decision.

If courts place restrictions regarding sexual activity on gay parents that would not be imposed upon heterosexual parents, then courts are actually basing the custody decision upon the parent's status as gay, lesbian, or bisexual, not the parent's conduct as a sexually active adult. The court's status/behavior distinction becomes merely a pretext for a decision based upon status. Heterosexual parents are not routinely asked to forgo sexual relationships with other adults to obtain possible custody of their children — lesbian and gay parents are.[41]

Inappropriate sexual behavior around children by any parent should be discouraged by the court to the extent that exposure to such behavior is obviously not in the child's best interest. The problem lies, however, with courts that consider any display of affection between adults of the same sex, including hand-holding and hugging, to be overtly sexual and inappropriate.[42] Meanwhile, the same behavior between heterosexual

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40. *See, e.g.*, S. v. S., 608 S.W.2d 64 (Ky. Ct. App. 1980), *cert. denied* 451 U.S. 911 (1981) (noting the potential harm to the child due to social stigma and isolation resulting from mother's overt lesbianism); *L. v. D.*, 630 S.W.2d at 242-43.

41. Hitchens, *supra* note 10, at 94. *Compare* N.K.M. v. L.E.M., 606 S.W.2d 179, 186 (Mo. Ct. App. 1980) (same-sex relationship "voluntarily chosen") *and L. v. D.*, 630 S.W.2d at 244 (parent "refused to give up [gay] lifestyle.") *with* Wilhelmsen v. Peck, 743 S.W.2d 88, 93 (Mo. Ct. App. 1987) (mother's extramarital heterosexual cohabitation insufficient to warrant change of custody). *Cf. Thigpen*, 730 S.W.2d at 512 (court claims both heterosexual and homosexual "illicit" (non-marital) relationships would be treated in same way). *But see* Ketron v. Aguirre, 692 S.W.2d 261 (Ark. Ct. App. 1985) (custody granted to mother living with married man with order that living arrangements be terminated). *See also* Sheppard, *Lesbian Mothers II: Long Night's Journey Into Day*, 8 WOMEN'S RTS. L. REP. 219, 231 (1985) (in fourteen of sixteen cases that lesbian mothers lost, the mother had a partner); Robert G. Bagnall et al., Note, *Burdens on Gay Litigants and Bias in the Court System: Homosexual Panic, Child Custody, and Anonymous Parties*, 19 HARV. C.R.C.L. L. REV. 497, 525 (1984).

42. *See, e.g., S. v. S.*, 608 S.W.2d at 65 (exchanging vows and rings); S.E.G. v. R.A.G., 735 S.W.2d 164, 166 (Mo. Ct. App. 1987) (showing affection in front of children and sleeping together in the family home); M.J.P. v. J.G.P., 640 P.2d 966, 967 (Okla. 1982) (had "wedding," held hands in child's presence); *Roe*, 324 S.E.2d at 693 ("flaunting" relationship by sharing bed in home) (*see supra* notes 23-26 and accompanying text); In the Matter of the Marriage of Cabalquinto, 718 P.2d 7 (Wash. Ct. App. 1986) (striking trial court's order that father limit association with partner during visitation); J.L.P. (H.) v. D.J.P., 643 S.W.2d 865, 871-72 (Mo. Ct. App. 1982) (taking child to church where many members were gay and to activist social meet-

adults is not considered to negatively affect the child. Thus, even though the court cites the "behavior" of the gay or lesbian parent as being the deciding factor, because that behavior would not be a factor when a heterosexual parent is involved, the decision is actually based upon the sexual orientation of the parent.[43] In addition, since gay men and lesbians are unable legally to marry their same-sex partners, courts that negatively view any non-marital relationship, whether same-sex or opposite-sex, impose an additional burden on gay parents, who are unable to legitimize their relationships by marrying their partners.[44]

Presumptive unfitness decisions generally involve restrictions on the presence of a same-sex partner in the household, but may sometimes even prohibit any exposure of the child to the parent's partner. The parent may be prohibited from involvement in gay organizations or churches, or even from associating with other gay persons while the child is present. *A. v. A.* is a typical presumptive unfitness case.[45] The father in this case had assumed custody upon the parents' divorce. The mother had not maintained any relationship with her children during the eleven years between the divorce and the motion to modify. The father had admitted to "possible homosexual traits and tendencies" after the initial custody determination,[46] yet he was permitted to retain custody because the evidence did not show any exposure of the children to "deviant sexual acts," nor was any adverse effect upon the children demonstrated. The court responded to the motion to modify by ruling that the father was prohibited from having a partner live in the family home, and that his custody would be placed under the supervision of the juvenile authorities.[47]

N.K.M. v L.E.M.[48] is a presumptive unfitness case with more adverse results for the gay parent than those in *A. v. A.* The lesbian mother was initially granted custody, provided that her partner was never allowed in the presence of her daughter. When the condition was violated, the father sought and was granted custody. The court found that the daughter's best

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43. *See* NATIONAL LAWYERS GUILD, *supra* note 15, at 1-19. *See also* Atkinson, *supra* note 11, at 29 ("A [heterosexual] parent who has a relationship of which the child might be aware, but refrains from engaging in sex when the child is home, will also usually not lose custody.").

44. *See, e.g., Thigpen,* 730 S.W.2d at 512-14; *Roe,* 324 S.E.2d at 694 (*supra* notes 23-28 and accompanying text).

45. A. v. A., 514 P.2d 358 (Or. App. 1973).

46. *Id.* at 359.

47. *Id.* at 360-61.

48. *N.K.M.*, 606 S.W.2d 179 (Mo. Ct. App. 1980). While this case uses presumptive unfitness language, the result would have been the same had the court employed the conclusive disqualification standard used in later Missouri cases. *See supra* note 30 and accompanying text.

interests were not served by any association with her mother's partner. To ensure further contact did not occur, the father was awarded custody.[49] The court did not acknowledge that nongay parents are not routinely expected to prevent their partners from becoming part of the family.[50]

Thus, gay parents are forced to make impossible and intolerable decisions. Parents who fail to comply with the court's restrictions may lose their children. If they do comply, they may lose their partners or the ability to be openly gay and to maintain contact with other gay persons, which takes its own psychological toll.[51] Nancy Polikoff, a frequent commentator on gay and lesbian custody issues, states that, "the more we [lesbians, gay men and bisexuals] appear to be part of the mainstream, with middle-class values, middle-of-the-road political beliefs, repressed sexuality, and sex-role stereotyped behavior, the more likely we are to keep custody of our children."[52] Even those who do not subscribe to these values but are willing to put forth this appearance in order to maintain custody may find that courts are extremely predisposed against them.[53]

C. DIRECT ADVERSE IMPACT STANDARD

The direct adverse impact standard, also called the nexus test, requires a court to find that the parent's homosexuality adversely affects the child before custody will be denied.[54] Under this test, the gay or lesbian parent begins on a more equal footing with the nongay parent. Instead of having to prove that homosexuality does not and will not affect the child, the burden of proof is shifted to the nongay parent, who must conclusively demonstrate that the other parent's homosexuality is presently affecting the child in a negative way. Courts employing this standard have recognized that it is no more valid to presume a gay parent is automatically an unfit parent than it was to presume that the female parent was automatically the most fit parent, as was held under the "tender years" approach

49. *N.K.M.*, 606 S.W.2d at 183.

50. Hitchens, *supra* note 10, at 94.

51. *See* NATIONAL LAWYERS GUILD, *supra* note 15.

52. Nancy Polikoff, *Lesbian Mothers, Lesbian Families: Legal Obstacles, Legal Challenges*, 14 N.Y.U. REV. L. & SOC. CH. 907 (1986).

53. *See, e.g.*, Anagnostopoulos v. Anagnostopoulos, 317 N.E.2d 681, 683 (Ill. Ct. App. 1974) (mother who drove a motorcycle, was not religious, had gay friends, was possibly gay herself, and wanted a career was not entitled to custody. The court expressed its disdain for the mother as "one of the members of the current avant-garde.").

54. Lauerman, *supra* note 20, at 658; Beargie, *supra* note 20, at 76-78. The use of this standard was advocated by Nan Hunter and Nancy Polikoff in *Custody Rights of Lesbian Mothers: Legal Theory and Litigation Strategy*, 25 BUFFALO L. REV. 691, 714-15 (1976).

formerly employed by courts.[55]

Doe v. Doe employs this adverse impact standard.[56] In *Doe*, the parents had joint legal custody, with physical custody primarily exercised by the father. When a conflict arose between the two parents, the father petitioned for sole legal and physical custody, based on his ex-wife's relationship with the woman who shared her home. The court here presumed that the mother's lesbian relationship alone was not a valid reason to preclude her from retaining joint custody. After considering testimony by psychiatrists, the court concluded that "[t]here is no evidence to show that the wife's lifestyle will adversely affect [the child]."[57] Since there was no showing of direct adverse impact upon the child, homosexuality was not a factor in the custody decision.

In re Marriage of Birdsall also demonstrates the courts' use of the nexus test.[58] Mr. Birdsall, a gay parent, was not allowed to have any third party known to be gay present during his child's visitation. The court vacated the order containing the restriction, holding that "[n]o current harm to the child can be attributed to [the father's] sexual orientation. And there is no evidence of future detriment . . . . Evidence of one parent's homosexuality without a link to detriment to the child, is insufficient to constitute harm."[59] The court also strongly rejected unfounded biases apparently relied upon by the lower court in making its decision. The lower court had concluded that even the father considered his lifestyle harmful to his child, based on the fact that he had stated that he would not raise his son to be gay. The lower court also concluded that the child would be negatively impacted by the conflict between the father's homosexuality and the mother's religious beliefs.[60] The appellate court disagreed with the inference that the father believed his lifestyle harmful, and found that the mother's religious condemnation was not an adequate basis to deny custody.[61]

IV. MYTHS ABOUT HOMOSEXUALITY AFFECTING CUSTODY DECISIONS

When courts use either the conclusive disqualification standard or the rebuttable presumption standard instead of the direct adverse impact standard, the court's rationale for choosing the standard often includes the use

55. *See supra* note 13 and accompanying text.
56. Doe v. Doe, 452 N.E.2d 293 (Mass. Ct. App. 1983).
57. *Id.* at 296.
58. In re Marriage of Birdsall, 197 Cal. App. 3d 1024 (1988).
59. *Id.* at 1031.
60. *Id.* at 1030.
61. *Id.*

of one or more myths about the relationship between an individual's homosexuality and her or his fitness as a parent. Although these myths have been empirically disproven, courts will often reject scientific research by simply stating that homosexuality is bad and will be harmful to the child,[62] or by discounting expert testimony that does not support its result.[63] Continuing to educate the judiciary may help in this regard. However, Nancy Polikoff feels that educating the judiciary has accomplished little, since even in recent cases where a great deal of expert testimony and scientific data was presented to counter myths about homosexuality, courts have still found reasons to doubt the credibility of this evidence.[64] The following are the most common myths surrounding homosexuality, and thus the myths most often articulated in child custody cases.

A. HOMOSEXUALITY AS MENTAL ILLNESS

Courts often view lesbian and gay parents as mentally unstable, and thus unfit to care for their children.[65] However, researchers have concluded that there is no evidence that homosexuals as a group are more neurotic, unhappy, or psychologically maladjusted than heterosexuals living similar lives.[66] In 1973, the American Psychiatric Association removed homosexuality from its list of mental illnesses, stating that "homosexuality per se implies no impairment in judgment, stability, reliability or general social or vocational abilities."[67] The American Psychological Association has issued a policy statement which affirms that "sexual orientation of natural . . . parents should not be the sole or primary variable considered in custody . . . cases."[68] In short, there is no basis for the conclusion that homosexuality equals instability. Therefore, courts should rely upon individualized determinations of each parent's mental and emotional stability instead of automatically concluding that the gay, lesbian, or bisexual parent is the least stable of the two parents contesting custo-

62. *N.K.M.*, 606 S.W.2d at 186.

63. *See J.L.P.(H.)*, 643 S.W.2d at 868-69; *see also supra* note 22.

64. Nancy Polikoff, Contested Child Custody and Visitation Issues, panel presentation at Lavender Law II, (Oct. 6, 1990).

65. *See, e.g.*, Bezio v. Patenaude, 410 N.E.2d 1207 (Mass. 1980) (rejects trial court's conclusion that lesbian mother unstable); *see also Thigpen*, 730 S.W.2d at 512 (court relies on testimony regarding prior instability despite evidence of stability during marriage).

66. ALAN P. BELL & MARTIN S. WEINBERG, *Homosexualities: A Study of Diversity Among Men and Women* (1978).

67. Susoeff, *supra* note 12, at 872 (quoting AMERICAN PSYCHIATRIC ASSOCIATION, D.S.M. III: DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (3rd ed. 1980)).

68. J.J. Conger, *Proceedings of the American Psychological Association, for the year 1976: Minutes of the Annual Meeting of the Council of Representatives*, 32 AMERICAN PSYCHOLOGIST 432 (1977).

dy.

B. SEXUAL ORIENTATION OF CHILD

Another common myth about homosexuality is that children exposed to homosexuality on an extensive basis will "become" gay themselves.[69] Underlying this belief is an assumption that heterosexuality is preferable to homosexuality, and that it would be negative for children to emulate their gay parents. This assumption is one that many people would dispute.[70] This myth is illogical since it fails to explain how so many children raised by heterosexual parents "acquired" their homosexuality, since most gay individuals were raised in heterosexual households.[71]

Scientific studies of children raised by gay parents have conclusively shown that there is no higher prevalence of homosexuality in those families than in heterosexual families. One study comparing lesbian and single-parent households found "no differences in terms of gender identity, sex role behavior, or sexual orientation."[72] Another researcher who studied only households of gay and transsexual parents found that "all [the children] have developed a typical sexual identity, including heterosexual orientation."[73]

Perhaps what courts actually fear is that when a child is raised in a household where homosexuality is clearly acceptable, the child may grow up more aware of his or her own sexual orientation. If the child is gay, she or he may be less likely to fear the stigma of coming out than a child raised in a heterosexual household, and thus may be more likely to be *openly* gay at a young age.[74] However, those youths who are not aware of or feel unable to reveal their sexual orientation are no less gay

69. *See, e.g., S. v. S.*, 608 S.W.2d at 66 (appellate court accepted court-appointed psychologist's testimony as to daughter in dispute "having difficulties in achieving a fulfilling heterosexual identity of her own"); Conkel v. Conkel, 509 N.E. 2d 983, 986 (Ohio App. 1987) (rejects heterosexual mother's contention that child will become gay through exposure to gay father); *N.K.M. v. L.E.M.*, 606 S.W.2d at 186 ("who would place a child in a milieu where she may be inclined toward [homosexuality]?").

70. M. Neil Browne & Andrea Giampetro, *The Contribution of Social Science Data to the Adjudication of Child Custody Disputes*?, 15 CAP. U. L. REV. 43, 47 (1985); HARVARD LAW REVIEW EDITORS, *supra* note 19, at 129.

71. ACHTENBERG, *supra* note 2, at 3.

72. Susan Golombok, Ann Spencer, & Michael Rutter, *Children in Lesbian and Single Parent Households: Psychosexual and Psychiatric Appraisal*, 4 J. OF CHILD PSYCHOL. AND PSYCHIATRY AND APPLIED DISCIPLINES 551, 571 (1983).

73. Richard Green, *Sexual Identity of 37 Children Raised by Homosexual or Transsexual Parents*, 135 AM. J. OF PSYCHIATRY 692, 696 (1978).

74. This appears to be one of the concerns in *M.J.P.*, 640 P.2d at 968 ("If homosexual behavior is legalized, and thus partly legitimized, an adolescent may question whether he or she should 'choose' heterosexuality. At the time their sexual feelings begin to develop, many young people have more interests in common with members of their own sex.").

than their openly gay counterparts.

Children raised in openly lesbian or gay households may learn to accept and admire homosexuality, or any other form of diversity, without necessarily being gay or lesbian themselves. Educating the courts is critical. Courts must be shown that sexual orientation is determined at an early age,[75] and that custody by gay parents will not affect the child's sexual orientation, but in fact may serve to benefit the child by strengthening the child's acceptance of diversity in him or herself and in others.[76]

C. ABUSE OR MOLESTATION BY GAY PARENTS

Another myth damaging to favorable custody determinations involving gay parents is the belief that gay parents are more likely to abuse or molest their children. Evidence does not support this myth. Research shows that heterosexual males constitute the overwhelming majority of those who sexually abuse children (generally their daughters), and that women rarely molest children.[77] Courts still seem willing to accept the myth, however, and either restrict custody or visitation rights on this basis, or deny gay and lesbian parents custody altogether.[78] Occasionally, parents have even been denied the opportunity to interact with their children without another adult present ostensibly to monitor their behavior.[79] The sensationalism of our nation's press when reporting incidences of homosexual child molestation further perpetuates this myth; one is led to believe that only gay people molest children even though, as indicated, heterosexual father/daughter molestation is much more common.

D. LIKELIHOOD OF CONTRACTING AIDS FROM GAY PARENT

Another myth is that AIDS can be transmitted through casual contact, or the hugging and kissing present in parent/child interaction. It cannot.[80] Nevertheless, trial courts have requested gay parents to undergo

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75. *See infra* p.38 and note 118.

76. Bagnall et al., *supra* note 41, at 534.

77. *See*, AMERICAN HUMANE ASSOCIATION, CHILDREN'S DIVISION, PROTECTING THE CHILD VICTIM OF SEX CRIMES COMMITTED BY ADULTS 216-17 (V. DeFrancis ed., 1969), cited in ACHTENBERG, *supra* note 2, at 13 (97% of sex offenders against children are male, and 90% of victims are female).

78. *See, e.g., J.L.P.(H.)*, 643 S.W.2d at 867, 869 (court refused to believe testimony that 95% of adult molestation is heterosexual, and instead asserts, "[e]very trial judge . . . knows that the molestation of minor boys by adult males is not as uncommon as the psychological experts' testimony indicated.").

79. *See, e.g.*, Roberts v. Roberts, 489 N.E. 2d 1067, 1070 (Ohio App. 1985) (remanded with recommendation that visitation by father take place in presence of mother, or other "sufficiently controlled" circumstances to shield the children from their father's homosexuality). *See also* Hitchens, *supra* note 10, at 94.

80. Gerald H. Friedland, Brian R. Saltzman, Martha F. Rogers, et al., *Lack of*

HIV antibody testing or have restricted custody of a gay parent because they fear that the child is at risk by living with a gay parent, even if that parent is not HIV positive.[81] Even though lesbians as a group are the least at risk for contracting AIDS (less so even than heterosexual parents[82]), lesbians have also been affected by AIDS misinformation.[83]

E. STIGMA OR HARASSMENT OF CHILD

The final myth about child custody by gay parents is that the child will be subject to stigma or harassment by her or his peers if the gay or lesbian parent obtains custody.[84]

This assumes a number of factors which may or may not actually be present in each child's particular situation; however, courts often proceed as if the child is automatically subject to stigma both now and in the future. This myth presumes that other children in the community are aware of their playmate's parenting situation. Many children may be unaware, however, that a same-sex couple is raising their friend, or may not understand that some attach a moral stigma to homosexuality. It also presumes that if others are aware of the parenting situation, they will stigmatize the child. In fact, they may not disapprove or care.

Another presumption is that stigma and harassment will be lessened if the gay parent does not have custody. If the presumption is that stigma will follow the child of the gay parent, the stigma would not be lessened if the child does not live with that parent because the mere existence of a gay parent could cause the child to be stigmatized.[85] Yet another presumption is that any stigma will be harmful to the child, and that such a stigma will outweigh the benefits conferred by custody in the hands of the parent otherwise best suited to custody.[86] Researchers have found

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Transmission of HTLV-III/LAV Infection to Household Contacts of Patients with AIDS or AIDS-Related Complex with Oral Candidiasis, 314 N. ENGLAND J. MED 344 (No. 6, Feb. 6, 1986); Merle A. Sande, *Transmission of AIDS, The Case Against Casual Contagion*, *id.* at 380.

81. *Conkel*, 509 N.E.2d at 987; Stewart v. Stewart, 521 N.E.2d 956, 963-66 (Ind. Ct. App. 1988); Doe v. Roe, 526 N.Y.S.2d 718, 725 (Sup. Ct. 1988).

82. ACHTENBERG, *supra* note 2, at 4 (citing telephone conversation with CDC official).

83. HARVARD LAW REVIEW EDITORS, *supra* note 19, at 127, n. 64.

84. *Jacobson v. Jacobson*, 314 N.W.2d 78, 81 (N.D. 1981); *M.J.P.* 640 P.2d at 969; *contra* M.P. v. S.P., 404 A.2d 1256 (N.J. Super. Ct. App. Div. 1979) (an excellent examination of the purported effects of stigma and harassment).

85. *See M.P.*, 404 A.2d at 1262 (concludes that stigma would not be lessened if the nongay parent had custody, since "children's exposure to embarrassment is not dependent upon the identity of the parent with whom they happen to reside").

86. *Id.* ("Within the context of a loving and supportive relationship, there is no reason to think that the girls will be unable to manage whatever anxieties may flow from the community's disapproval of their mother.").

that only about 5 percent of children who have lived with an openly gay parent have been harassed by other children.[87] In addition, researchers have found no connection between a parent's same-sex orientation, or any resulting stigmatization, and the development of emotional problems in children.[88]

V. CONSTITUTIONAL ARGUMENTS ON BEHALF OF THE LESBIAN/GAY PARENT

The existence of a federal constitutional standard specifically governing lesbian and gay custody cases, or generally governing all custody cases, would be invaluable. A constitutional standard based on equal protection, privacy, or freedom of association grounds would provide a guideline for courts that might otherwise resort to personal bias to reach a decision, and would provide a strong basis for appeal when lower courts ignore the standard and make biased decisions.

A cautionary note is in order, however. Child custody cases do not often hinge upon constitutional issues, and those who represent gay and lesbian parents should not neglect treatment of the gay parent's individual parenting situation in order to focus upon constitutional issues.[89] Constitutional grounds are most effective when used to strengthen the gay parent's case, but should not be the sole focus. If the court's decision is to be based upon the superior ability to parent, the attorney will want to ensure success on those grounds by making a strong argument on behalf of the gay or lesbian parent.[90]

The United States Supreme Court has yet to decide any case involving gay parents and child custody, so the merit of the following arguments have not been determined by our highest court. Therefore, courts are free to accept or reject these arguments by distinguishing them from cases already decided by the Supreme Court.

Attorneys furthering gay rights claims may be reluctant to approach the current Supreme Court after the adverse result in *Bowers v.*

87. Brian Miller, *Gay Fathers and Their Children*, 28 FAM. COORDINATOR 544, 548 (Oct. 1979). *See also* Green, *supra* note 73, at 695. Harry Zelinka, an evaluator and mediator for the Office of Family Court Services in Santa Clara County, also asserts that stigmatization is quite rare in the custody disputes with which he has been personally involved. Presentation at BALIF Family Law Conference (November 17, 1990).

88. Martha Kirkpatrick and Donna Hitchens, *Lesbian Mothers/Gay Fathers*, in EMERGING ISSUES IN CHILD PSYCHIATRY AND THE LAW (Elissa P. Benedek and Diane H. Schetky eds., 1985).

89. Hunter and Polikoff, *supra* note 54, at 725.

90. ACHTENBERG, *supra* note 2, at 6 (application of a nexus standard would permit a decision on the grounds of parenting ability).

Hardwick,[91] which contained inflammatory rhetoric against homosexual sodomy. However, some lower federal courts have been willing to grant gay men and lesbians constitutional rights.[92] Success may also be possible at the state court level,[93] as custody decisions remain in state courts unless appealed to the United States Supreme Court.

A. EQUAL PROTECTION

1. Constitutionality of Custody Decisions Based on Biases

The 1984 United States Supreme Court case of *Palmore v. Sidoti*[94] may have particular relevance to the situation of gay parents seeking custody. In *Palmore*, the mother lost custody of her daughter to her ex-husband after she married an African-American. Chief Justice Burger, in his Supreme Court opinion, cited heavily from the trial court's holding, presumably to decry its egregiousness. The trial court claimed, "the wife . . . has chosen for herself and for her child, a life-style unacceptable to the father and to society," and that "[the mother's choice of a black spouse] tended to place gratification of her own desires ahead of her concern for the child's future welfare."[95] The basis for the trial court's decision was that "it is inevitable that [the child] will . . . suffer from the social stigmatization that is sure to come."[96] The language used by the trial court here is likely to be found in almost every case that has been decided adversely to a gay parent.

The Supreme Court strongly rejected the trial court's analysis. While the Court recognized the risk that the child would be subject to "pressures and stresses not [otherwise] present,"[97] it held that "[t]he question, however, is whether the reality of private biases and the possible injury they might inflict are permissible considerations for removal of an infant child from the custody of its natural mother. We have little difficulty concluding that they are not."[98] This was a unanimous decision, so there can be no doubt that the Court strongly believes that "[p]rivate biases may be outside the reach of the law, but the law cannot, directly or indi-

91. Bowers v. Hardwick, 478 U.S. 186 (1986).

92. High Tech Gays v. Defense Indus. Security Clearance Ofc., 668 F. Supp. 1361 (N.D. Cal. 1987), *rev'd in* 895 F.2d 563 (9th Circ. 1990); Watkins v. United States Army, 847 F.2d 1329 (Wash. 1988), *vacated and affirmed on other grounds*, 875 F.2d 699, *cert. denied* 111 S. Ct. 384 (1990).

93. *See, e.g.*, S.N.E. v. R.L.B., 699 P.2d 875 (1985); *Conkel*, 509 N.E.2d 983; M.A.B. v. R.B., 510 N.Y.S.2d 960 (Sup. Ct. 1986).

94. Palmore v. Sidoti, 466 U.S. 429 (1984).

95. *Id.* at 431.

96. *Id.*

97. *Id.* at 433.

98. *Id.*

rectly, give them effect."[99]

Palmore may be distinguished in that it involved a racial classification which the Court had already found required "most exacting scrutiny."[100] Given the result in *Bowers v. Hardwick*,[101] where the Court failed to recognize how sodomy laws adversely impact gay men, lesbians, and bisexuals, the Court seems less likely to determine that sexual orientation discrimination warrants such a high level of scrutiny, if it deserves heightened scrutiny at all. However, given the passion of the language in Chief Justice Burger's opinion, and the unanimity of the Court, it is certainly reasonable to assume that any biases that interfere with a true determination of the child's best interests will be found unconstitutional. *Palmore* should preclude application of the conclusive disqualification standard or the rebuttable presumption standard to the extent that custody limitations are founded upon bias.

Some state courts have already deemed *Palmore* applicable to a custody decision involving a gay parent.[102] The Alaska Supreme Court, in 1985, cited *Palmore* when it ruled that, "it is impermissible to rely on any real or imagined social stigma attaching to the mother's status as a lesbian."[103] Perhaps it is not overly optimistic to believe that as more research is conducted, and more education of society in general takes place, courts will be able to recognize the irrationality of their personal biases and attempt to exclude them from an evaluation of what is truly best for the child.

2. Constitutionality of Irrebuttable Presumptions

Courts that presume that no gay parent can be a fit parent by using the conclusive disqualification standard employ an irrebuttable presumption that is constitutionally questionable in light of the United States Supreme Court decision of *Stanley v. Illinois*.[104] Mr. Stanley was denied any rights to custody after his children's mother died because he had not been married to her. The state of Illinois operated under the presumption that unwed fathers were unfit, and thus no hearing to determine actual fitness was necessary before the children were declared wards of the state. The U.S. Supreme Court rejected this presumption, finding that the state had denied Stanley due process of law by denying him a hearing. The Court further found that by distinguishing between unwed fathers and all other parents, the state had denied Stanley the equal protection of the

99. *Id.*
100. *Id.* at 432.
101. *Hardwick*, 478 U.S. 186.
102. *See supra* note 93 and accompanying text.
103. *S.N.E.*, 699 P.2d at 879.
104. Stanley v. Illinois, 405 U.S. 645 (1972).

laws guaranteed to him under the Fourteenth Amendment.[105]

The Court in *Stanley* detailed a line of cases that demonstrated that parents clearly have an interest in raising their children.[106] Next, the opinion cites past cases that have found blanket exclusions based on one particular factor to be unconstitutional. A statute depriving military personnel of the right to vote in Texas was unconstitutional because "[i]t viewed people one-dimensionally . . . when a finer perception could readily have been achieved by assessing a . . . claim . . . on an individualized basis."[107] The Court then declared, "when, as here, the procedure forecloses the determinative issues of competence and care, when it explicitly disdains present realities in deference to past formalities, it needlessly risks running roughshod over the important interests of both parent and child."[108]

Those who consider the precedent of *Stanley* inapplicable for gay parents seeking custody seek to limit its applicability to situations in which a hearing is not available or is specifically denied. Since gay parents have their day in court (albeit an often unpleasant and unsatisfactory one), constitutionality under the Fourteenth Amendment would be satisfied. However, a hearing is useless to a gay parent if the court utilizes an irrebuttable presumption, just as a hearing would have had little benefit for Mr. Stanley if the policy was to deny unwed fathers custody.

Another possible means of distinguishing *Stanley* from gay parent cases is that the irrebuttable presumption in *Stanley* was a state policy, instead of legal precedent. However, although no custody statute contains on its face the irrebuttable presumption that all gay parents are unfit, the discretion provided by these statutes effectively permits the courts to employ such a presumption.[109] In states that appear willing to deny all gay parents custody, such as Missouri,[110] there is little difference between a policy provided to adjudicators by the legislature and a body of judicial precedent consistently relied upon to produce results adverse to gay parents. The result is the same: the irrebuttable presumptions will preclude custody. Indeed, one could argue that an irrebuttable presumption promulgated by a legislature, as in *Stanley*, is *more* deserving of judicial deference than a presumption created by court cases. Thus, use of an irrebuttable presumption, whatever its origins, violates procedural due process, as well as equal protection principles.[111]

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105. *Id.*
106. *Id.* at 651.
107. *Stanley*, 405 U.S. at 655, citing Carrington v. Rash, 380 U.S. 89 (1965).
108. *Id.*
109. NATIONAL LAWYERS GUILD, *supra* note 15, at 1-65.
110. *See supra* notes 27-30 and accompanying text.
111. NATIONAL LAWYERS GUILD, *supra* note 15, at 1-64.

3. Traditional Equal Protection Analysis

a. Strict Scrutiny

When a court applies equal protection analysis, it must first determine whether the government's action is "rationally related to a legitimate governmental purpose."[112] Since almost any actions taken by trial courts in relation to custody matters would probably meet such a minimal standard, it is necessary to determine whether a higher standard should apply.

If a suspect class is involved, the action will be subject to strict scrutiny.[113] While homosexuality has yet to be established as a suspect classification, sexual orientation shares many characteristics with other suspect classifications, such as race and national origin. If strict scrutiny is applied, then the classification must serve a "compelling" governmental goal.[114] The classification must also be "precisely tailored" to the governmental interest at issue.[115]

There are a number of factors that characterize a suspect classification. They include: (1) a history of discrimination; (2) discrimination based upon inaccurate stereotypes; (3) traditional exclusion from the political process; and (4) immutability of the characteristic.[116] Sexual orientation qualifies as a suspect classification in all these regards.

To determine whether there has been a history of discrimination, the courts "look to whether the class has faced a 'history of purposeful unequal treatment.'"[117] Lesbians, gay men, and bisexuals qualify in this regard. Laws, court decisions, and societal attitudes all either explicitly or implicitly suggest that discrimination against gay men and lesbians is permissible. Lesbians, gay men, and bisexuals also suffer from inaccurate stereotyping, as documented in Part IV.

While gay men and lesbians are beginning to have some influence on the political process, as a group they have traditionally been excluded from that process. Indeed, even nongay politicians who align themselves with gay issues subject themselves to political liability. Finally, while there is still some debate about the cause[s] of sexual orientation, it is generally agreed that same-sex orientation is not changeable and is established at an early age;[118] thus, it is immutable.[119] If homosexuality is

112. McLaughlin v. Florida, 379 U.S. 184, 191 (1964).

113. *Id.*

114. *Palmore*, 466 U.S. at 432.

115. Plyler v. Doe, 457 U.S. 202, 217 (1981).

116. Harris M. Miller II, Note, *An Argument for the Application of Equal Protection Heightened Scrutiny to Classifications Based on Homosexuality*, 57 S. CAL. L. REV. 797, 811 (1984).

117. *Id.* at 814.

118. *See* Baker v. Wade, 553 F. Supp. 1121 (N.D. Tex. 1982). *See generally* MAR-

considered a suspect classification, then governmental action must serve a compelling interest.

Custody decisions based upon the best interests of the child would likely constitute a compelling interest. Decisions that focus on the evils of homosexuality and fail to consider the best interests of the child should not survive a strict scrutiny standard since their reliance on conjecture and myth is inappropriate.[120] A blanket exclusion of all gay parents is also not narrowly tailored, since it permits the opposing parent to have custody regardless of whether that parent is fit or whether custody by that parent is actually in the child's best interests. For example, a conclusive disqualification standard excludes gay parents who are not sexually active and whose same-sex orientation is not known to the child, while allowing nongay parents whose sexual activity is harmful to the child to obtain or retain custody. Therefore, if sexual orientation is considered a suspect classification, governmental policy precluding custody by gay parents does not survive the strict scrutiny test.

It is difficult to persuade courts that sexual orientation should be a suspect classification. Some federal trial courts have been willing to do so, but have later been overturned at the appellate level.[121] Courts have been reluctant to expand the number of suspect classifications, and may have special difficulty doing so when the classification is as intensely debated as homosexuality. In addition, once sexual orientation is considered a suspect classification all forms of discrimination, including employment, housing, and military discrimination, will have to be eliminated throughout our legal system. Rather than take such a drastic step, courts may prefer to follow a lesser standard of scrutiny, or solve the problem of custody on alternative constitutional grounds.

b. Intermediate Scrutiny

States that deny custody to parents with same-sex partners, yet allow parents with opposite-sex partners to obtain custody, discriminate on the basis of gender, since parties are treated differently based on the gender of their companions. The gender-based classification is not negated by the fact that men and women are equally affected. Both *Loving v. Virginia* (prohibiting interracial marriage)[122] and *McLaughlin v. Florida* (prohib-

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CEL T. SAGHIR, M.D & ELI ROBINS, M.D., MALE AND FEMALE HOMOSEXUALITY (1973) (for a summary of the literature).

119. GEORGE H. WEINBERG, SOCIETY AND THE HEALTHY HOMOSEXUAL 69-71 (1973); ALAN P. BELL, MARTIN S. WEINBERG, & SUE KIEFER HAMMERSMITH, SEXUAL PREFERENCE: ITS DEVELOPMENT IN MEN AND WOMEN 32 (1981).

120. *Palmore*, 466 U.S. at 433.

121. *Watkins*, 847 F.2d at 1349.

122. Loving v. Virginia, 388 U.S. 1 (1967).

iting interracial cohabitation)[123] held that statutes applying race-based classifications are a form of racial discrimination. It follows that if gender-based classifications are employed, it results in gender discrimination, which should warrant an application of intermediate level scrutiny.[124]

The standard for intermediate level scrutiny, as articulated by the Supreme Court, is that the classifications employed must be related to achieving an important governmental interest.[125] Few would dispute that determining the best interests of the minor child is an important governmental interest. However, decisions that neglect the best interest of the child and instead focus upon the court's unfounded beliefs regarding the dangers of homosexuality no longer operate to protect that important governmental interest. It may well be in the best interests of the child to be placed in the custody of the gay parent. Some may argue that protecting traditional family values are important governmental objectives in and of themselves. However, objectives that further a particular moral/religious viewpoint, but at the same time restrict the rights of any minority group, should not warrant such deference. Use of a nexus standard would keep the focus upon the best interest of the child and ensure that only this important governmental interest was considered.

B. PRIVACY

Bowers v. Hardwick makes it difficult to sustain a privacy argument on behalf of the gay parent. If states are free to criminalize sodomy, states would be able to impose restrictions on those who presumably engage in criminal acts without violating their right to privacy. However, *Hardwick* may be distinguished. First, while states may criminalize the act of sodomy, presumably they are unable to criminalize the status of homosexuality.[126] Since custody cases may be decided without any evidence of actual same-sex activity, those decisions adverse to the gay parent are actually based on the parent's status as gay, lesbian, or bisexual.[127] Second, while *Hardwick* was based upon a federal constitutional right to privacy regarding homosexual conduct, custody cases are decided in state courts, under state statutes and constitutions. The particular state in which custody is being adjudicated may have an explicit or implicit right to privacy which may extend beyond those granted by the federal constitution.[128] The right to privacy in that state may preclude unwar-

123. *McLaughlin*, 379 U.S. 184.

124. Miller, *supra* note 116, at 811.

125. Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982); Craig v. Boren, 429 U.S. 190, 197 (1976).

126. *See* Robinson v. California, 370 U.S. 660 (1961) (invalidated California statute criminalizing the status of being an addict).

127. *See supra* notes 40-44 and accompanying text.

128. *See, e.g.*, ARIZ. CONST. art. 11, § 8; CAL. CONST. art. 1, § 1; FLA. CONST.

ranted intrusion by the state into the parent's sexual activity.

Finally, the additional factors of marriage, families, and children are present, which may be sufficient to negate *Hardwick*. The Court in *Hardwick* failed to find a right to privacy for homosexual sodomy since such a right was not related to marriage, procreation, or the family.[129] However, since a custody determination necessarily involves all of these factors, custody determination cases are more similar to *Griswold v. Connecticut*,[130] *Eisenstadt v. Baird*,[131] and *Pierce v. Society of Sisters*,[132] which limit the state's ability to interfere with the fundamental rights of the family.

While the state has a compelling interest in protecting the health and welfare of children, this compelling interest does not justify the use of the conclusive disqualification standard. Since there is no nexus per se between homosexuality and harm to children, the intrusion is unwarranted in the overwhelming majority of cases where no specific harm is articulated. Therefore, only the direct adverse impact standard, which requires that a nexus be demonstrated, should be permissible under current privacy doctrine.

C. FREEDOM OF ASSOCIATION

Cases applying the rebuttable presumption approach often utilize restrictions on custody or visitation that limit the gay parent's ability to associate with other gay and lesbian individuals. The gay parent may not be permitted to live with her or his lover, have the lover or other gay individuals in the presence of the child, or attend meetings of gay organizations or churches.[133] These restrictions unduly interfere with the gay parent's right to free association.

The United States Supreme Court first recognized the right of association in the case of *NAACP v. Alabama*, stating that any governmental action which has the effect of curtailing the freedom to associate "with others in pursuit of a wide variety of political, social, economic, religious, and cultural ends" is subject to the closest judicial scrutiny.[134] In addition, the Court in *Roberts v. United States Jaycees* recognized a right of "intimate association."[135] This right "afford[s] the formation and preservation of certain kinds of highly personal relationships a substantial mea-

art. 1, § 23; LA. CONST. art. 1, § 5.

129. *Hardwick*, 478 U.S. at 186.

130. 381 U.S. 479 (1965).

131. 405 U.S. 438 (1972).

132. 268 U.S. 510 (1925).

133. *See supra* Part III.B.

134. NAACP v. Alabama, 357 U.S. 449 (1958).

135. Roberts v. United States Jaycees, 468 U.S. 609 (1984).

sure of sanctuary from unjustified interference by the State."[136]

While in the *Jaycees* case the discussion involved the right of organizations to decline to admit women, a number of commentators have argued that this right should apply to relationships between parents and their same-sex companions.[137] Some courts have recognized that this right, coupled with the above-mentioned privacy rights, precludes the court's intrusion into intimate matters. One California Court of Appeal found it "intrusive upon the privacy and associational interests of the mother" for the lower court to condition custody upon her not having any male guests.[138] While courts retain the right to investigate the associations of the parent that might possibly impact the children and impose restrictions if necessary to promote the child's welfare, these restrictions are often imposed with minimal investigation and with no showing that a particular relationship is harmful. Instead the court assumes that any exposure to homosexuality is sufficient to warrant restriction.[139]

VI. CONCLUSION

Gay and lesbian child custody cases that utilize rebuttable or irrebuttable presumptions rely heavily on bias. Presumptions should be rejected in favor of a direct adverse impact, or nexus, standard, where harm caused by parental same-sex orientation must be demonstrated before that orientation is a factor in the custody decision. Utilizing a direct adverse impact standard would result in a more fair result for gay and lesbian parents. In addition, the result is more likely to comport with constitutional principles of equal protection, privacy, and freedom of association.

136. *Id.* at 619.

137. Kenneth L. Karst, *The Freedom of Intimate Association*, 89 YALE L. J. 624, 682-86 (1980); David A. J. Richards, *Constitutional Legitimacy and Constitutional Privacy*, 61 N.Y.U. L. REV. 800, 854 (1986).

138. In re Marriage of Wellman, 104 Cal. App. 3d 992 (1980).

139. NATIONAL LAWYERS GUILD, *supra* note 15, at 1-62.